

ABLEMAN, JUDGE

Jimmie Lewis (“Defendant” or “Lewis”) has filed this, his first Motion for Post Conviction Relief, in which he makes numerous allegations of ineffective assistance of counsel, as well as conspiracy between the Prothonotary, defense counsel, and the Attorney General’s office. For the reasons stated below, the motion is **DENIED**.

FACTS

The evidence at trial showed that Patrick Geer (“Geer” or “the victim”) was driving his car east on 4th Street in Wilmington around 12:30 a.m. As he drove towards King Street, he saw the defendant standing on the corner. When Geer stopped for a red light, Lewis asked him for “a ride up the hill,” which Geer took to mean Meetinghouse Hill. Geer informed Lewis that he wasn’t going in that direction. Defendant then jumped into Geer’s car. Geer decided to do what Defendant asked by making a U-turn, in the hope that Defendant would then just get out of the car.

As Geer drove, Lewis became increasingly agitated, saying that he needed money. Lewis then grabbed the wheel of the car, in an effort to force Geer to pull the car to the side of the road. When Geer pulled the car to a stop, Lewis began fumbling with his left pocket. Geer, afraid that Lewis was fumbling for a weapon, jumped out of the car and tried to find someone to call the police. Unable to get any of the passing cars to stop, Geer walked to a nearby gas station where he asked

the station attendant to call the police. As Geer waited for the police, Lewis pulled up in the car, shouted something to Geer from across the street, then drove away. The Wilmington police later found Geer's car a few blocks away, with Lewis inside.

At trial, Lewis testified on his own behalf and told a very different version of the evening's events. According to him, he was walking west on Fourth Street in search of a cab when Geer stopped and asked if he wanted a ride. Lewis, claiming that he believed that Geer was driving a "gypsy cab," said yes. According to Lewis, as they were driving, Geer reached over and grabbed Lewis between the legs, saying he wanted sex. When Lewis refused, Geer offered \$100 and the use of his car to Lewis to find someone interested in having sex. Lewis took the car, leaving Geer at the gas station, but almost immediately returned, saying that he was unfamiliar with Wilmington. Geer urged him on. When he returned to the station a second time, Geer was gone. Defense counsel accordingly argued, as best he could, that Lewis had permission to drive Geer's car and that a charge of carjacking was thus inappropriate. Defense counsel clearly did this at the insistence of his client, whose testimony made any other conceivable defense impossible to prove.

On the first day of trial, Lewis demanded that the Court consider motions he had asked his attorney to file. Defense counsel indicated to the Court that he had

declined to file the motions because he had determined that they had no basis in law, or were not material to the defense theory of the case. The Court informed Lewis that the time had passed for presenting pre-trial motions. Lewis then insisted that he represent himself *pro se*. When the Court refused to permit Lewis to discharge his attorney on the morning of trial, Lewis began accusing the Court of prejudicing the trial against him. The Court informed Lewis that his behavior was, and had been, inappropriate for a court of law, and that he would have to sit quietly and stop interrupting the proceedings, or the Court would hold him in contempt. In response, the Defendant claimed that he could not understand the Court's instructions, because he was hearing voices.¹ Defense counsel informed the Court that he was unaware of any mental health issues because Lewis had not indicated that he had ever been treated for mental illness, or been prescribed medication, in response to initial investigatory inquiries. Defense counsel also noted that he had met with Defendant three times at the prison, and twice for case reviews, and that Defendant had never previously indicated that his mental health was an issue.

¹ "THE COURT: Sir, sir, we're going forward with trial at 2 o'clock. There will be no motions presented today. There will be no motions presented today. We are going forward with evidence at 2 o'clock and I will expect you to conduct yourself as if you're in a courtroom and not to interrupt the proceedings. Do you understand? Do you understand? Do you understand? Do you understand, sir? Or do I have to find you in contempt and leave you in jail until you tell me 'yes or no' because we don't have to go forward today with this trial. We can wait forever. THE DEFENDANT: I'm hearing voices right now. I don't understand. I can't understand you. I'm hearing voices right now. THE COURT: What do you mean you're hearing voices? THE DEFENDANT: I have a psychological condition. I didn't take my medicine today. I'm hearing voices. I don't understand what you're trying to tell me." Trial Transcript, D.I. 83, p.15.

The Court ordered defense counsel to investigate Defendant's claims during the lunch break. After investigation, counsel reported that in order to receive medical files from the Department of Corrections, Lewis would have to sign a waiver releasing the information, which Lewis refused to do, claiming that he did not understand what was being asked of him. The Court informed Lewis that in order for any mental conditions to be taken into consideration, he would have to sign the waiver, at which time Lewis agreed.

The trial proceeded, notwithstanding Lewis' efforts to delay the inevitable, and at the conclusion of the evidence a Superior Court jury convicted Lewis of Carjacking and related offenses. Prior to sentencing, the Court ordered further evaluation of Lewis at the Delaware Psychiatric Center. The primary diagnosis in the report was that Defendant was malingering, or intentionally exaggerating his symptoms in order to gain attention and avoid prison. Accordingly, on February 11, 2003, this Court sentenced Defendant to a total of eight years incarceration.

Lewis' conviction and sentence were upheld by the Supreme Court on direct appeal, on September 29, 2005.² In that appeal, the Supreme Court considered and rejected claims by Lewis that this Court committed error by not instructing the jury on the lesser-included offense of unauthorized use of a motor vehicle, that the judge admitted unduly prejudicial evidence, and that the judge failed to take

² *Lewis v. State*, 2005 WL 2414293 (Del. Supr.).

account of his mental status during the trial. The Supreme Court held Lewis had failed to request an instruction on the lesser included offense of unauthorized use of a vehicle, and that such an instruction would have been inconsistent with Lewis's testimony that Geer had given him permission to drive his car. The Supreme Court further found that no error had been made on the question of the admission of evidence, and that the Court had properly dealt with Defendant's mental claims in light of the psychological analysis that Defendant was malingering.

PROCEDURAL HISTORY

In addressing claims for postconviction relief, the Court must first apply the procedural bars of Rule 61(i) before considering the merits of the individual claims.³ The record reflects that Defendant has filed a series of motions to modify his sentence, but that this is his first Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61, filed within one year after his conviction was made final.⁴ The motion is therefore timely and not repetitive under Rule 61(i)(1)-(2).⁵ Because this is Defendant's first postconviction motion, and it asserts claims of ineffectiveness of counsel, the Court ordered defense counsel's

³ *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991).

⁴ Super. Ct. Civ. R. 61(i)(1). Defendant has one year after the judgment of conviction is final to file a motion for postconviction relief. A conviction becomes final when the direct appeal process is complete. *State v. Condon*, 2002 WL 1364619 (Del. Super.).

⁵ Rule 61(i)(2) provides that any ground for relief not asserted in a prior postconviction proceeding is thereafter barred.

affidavit and the State's response pursuant to Supreme Court preferred practice.⁶ The Court recognizes that filing a response to Defendant's rambling and often incoherent motion, containing eighty-three allegations, was no small task.

PROCEDURAL BARS

Rule 61(i)(3) provides that grounds for relief that were not asserted in the proceedings leading to a final judgment of conviction as required by the rules of the Superior Court are thereafter barred. Procedural default may be avoided if the movant can demonstrate both cause and actual prejudice.⁷ Cause may be demonstrated if movant can show "some external impediment" that prevented him from raising the claim either at trial or on appeal.⁸

Lewis makes ten allegations that are subject to procedural default due to his failure to raise the issues either during trial, or on appeal. Lewis alleges that the evidence to convict him was insufficient because the prosecution failed to submit as evidence surveillance video from the gas station, the property receipt enumerating property seized from Mr. Lewis when he was arrested, and the affidavit of probable cause. Lewis further alleges (i) that his Sixth Amendment right to an attorney was violated because defense counsel was not present when the victim picked a photo of Lewis out of a photographic lineup; (ii) that his trial

⁶ *Horne v. State*, 2005 WL 1949967 at *2 (Supr. Ct.); *Backus v. State*, Del. Supr., __ A.2d __, No.59, 2005, Berger, J. (Sept. 29, 2005) (ORDER).

testimony was tainted by fear of the Department of Corrections officer sitting near him while he testified; (iii) that cross-examination by the State regarding Lewis' previous criminal convictions was improperly permitted; (iv) that the jury instructions were improper because they subliminally influenced the jury to find Defendant guilty by repetitively using the word "guilty," and the phrase, "[i]f, after considering all of the evidence, you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner as to satisfy all of the elements which I have just stated, at or about the date and place stated in the indictment, you should find the defendant guilty;" (v) that the prosecutor made numerous inflammatory remarks;⁹ (vi) that this Court erroneously failed to evaluate Defendant's *pro se* motions the morning of trial; (vii) and that the Court lacks jurisdiction over Defendant because, according to Mr. Lewis, "no factual documented record that the jurors unanimously signed or verbalized [a] guilty verdict [exists]."

Defendant should have asserted each of these grounds for relief during the trial, and thereafter in his direct appeal to the Supreme Court. Furthermore, Lewis cannot demonstrate cause for relief from procedural default because he personally presented issues to the Supreme Court on direct appeal. In that appeal, the

⁷ *Blackwell v. State*, 736 A.2d 971 (Del. 1999). If the Court rules that the movant has failed to establish cause then it is not necessary to consider whether the movant can demonstrate prejudice. *Shelton v. State*, 744 A.2d 465, 478 (Del. 2000).

⁸ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

Supreme Court considered and addressed each issue raised by Lewis.¹⁰ Lewis had ample opportunity to present each of these claims either to this Court or the Supreme Court of Delaware. Lewis did neither and this Court will not now consider such claims in a collateral attack upon a criminal conviction.

Finally, Rule 61(i)(4) prevents this Court from considering grounds for relief that have been previously adjudicated, either during the trial leading to the judgment of conviction, or on appeal. Defendant may only overcome this bar by showing that reconsideration of the claim is warranted in the interest of justice, which requires a showing that subsequent legal developments have revealed that the trial court lacked authority to convict or punish.¹¹ Lewis alleges that evidence of his mental illness was improperly withheld from the jury, and that his attorney knew that he had mental problems before trial. The Supreme Court has already held that Lewis' claims regarding his mental health were unsubstantiated and appropriately resolved.¹² Defendant has merely reiterated his claim with minor changes, and has failed to establish that the law has changed from the time his sentence was affirmed by the Supreme Court in 2005.

⁹ In addition to being procedurally barred, this claim is belied by the record.

¹⁰ *Lewis* 2005 WL 2414293 at *2 (“Lewis responded with a brief that raises ten issues for this Court’s consideration...”)

¹¹ *State v. Wright*, 653 A.2d 288, 298 (Del. 1994).

¹² *Lewis*, 2005 WL 2414293 at *4.

LEGAL STANDARD

Lewis has filed a litany of complaints against his defense counsel. These ineffective assistance of counsel claims are properly proffered on a motion for postconviction relief, and will therefore be addressed here.¹³

To prevail on a claim for ineffective assistance of counsel, the movant must succeed on both prongs of the two-part *Strickland* test.¹⁴ First, the movant must show that counsel's errors were so egregious that his performance fell below an objective standard of reasonableness.¹⁵ If the movant is able to show objectively unreasonable performance, the movant must then show that there is a reasonable probability that, but for counsel's unprofessional errors or deficiencies, the outcome of the proceeding would have been different. Thus, the second prong of the analysis requires a showing of actual prejudice.¹⁶ In setting forth a claim of ineffective assistance of counsel, a defendant must put forth, and substantiate, concrete allegations of actual prejudice or risk summary dismissal.¹⁷ In analyzing a claim of ineffective assistance of counsel, the Court must bear in mind that there is a strong presumption that trial counsel's representation was within the "wide

¹³ As previously noted, Defendant's claims tend to be rambling and are often incoherent. The Court therefore has done its best to extract all legal argumentation from Defendant's submission. The Court has not evaluated Lewis' more bizarre allegations, including one that defense counsel's opening statements were impaired by his moving a courtroom podium in a "very unusual, clumsy and awkward manner."

¹⁴ *Strickland v. Washington*, 466 U.S. 668 (1984). See also *Mapp v. State*, 642 A.2d 837 (Del. Super. Ct. 1994); *Coverdale v. State*, 788 A.2d 527 (Del. Super. Ct. 2002).

¹⁵ *Id.* at 687.

¹⁶ *Id.*

¹⁷ *Grosvenor v. State*, 849 A.2d 33, 35 (Del. 2004) (citing *Younger v. State*, 580 A.2d 552, 556 (Del. 1990)).

range of reasonable professional assistance.”¹⁸ *Strickland* further instructs that this Court must eliminate from its consideration the “distorting effects of hindsight when viewing that representation.”¹⁹ Thus, judicial scrutiny of counsel’s performance is highly deferential.

DEFENDANT’S CONTENTIONS

A. Failure to Subpoena Evidence and Investigate

Lewis makes a total of eight claims²⁰ that defense counsel was ineffective for failing to subpoena (i) police property receipts enumerating property seized from Mr. Lewis when he was arrested; (ii) Lewis’ commercial driver’s license; (iii) the transcript to Lewis’ preliminary hearing; (iv) evidence of the exact time at which Defendant was booked; (v) video from a traffic surveillance camera located at the I-95 off ramp at 4th and Jackson Streets;²¹ (vi) 911 recordings; (vii) the photo lineup in which the victim identified Defendant to police; and (viii) surveillance video from the gas station. Defendant has failed to show that counsel’s actions in failing to obtain these items were in error, much less unreasonable error.

Lewis has not, and cannot, show that any of the above items were material or even relevant to his defense. Indeed, Lewis accuses his counsel of failing to obtain evidence that was either non-existent (the traffic surveillance tape), ceased

¹⁸ *Strickland*, 466 U.S. at 689.

¹⁹ *Id.*; *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996); *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

²⁰ This number is aggregated, since Lewis makes several claims repetitively.

²¹ No traffic surveillance cameras are located at 4th and Jackson Streets.

to exist (the gas station surveillance video had subsequently been taped over by the gas station owners), or to prove what was not in contention (Lewis' identity). Lewis' assertion that the police property receipts would have alerted his attorney to psychological problems is moot in light of the Supreme Court's holding that the issue of Lewis' mental health has been appropriately addressed.

Lewis likewise argues that defense counsel was ineffective for failing to conduct investigation of the gas station attendant, an alibi witness named "Mary," and other potential witnesses to the incident. Again, the Court notes that the fact that the attendant called 911 when so instructed by the victim was not in contention. Moreover, defense counsel's failure to conduct a search for a witness identified only as "Mary,"²² or for unnamed and unknown witnesses of an incident that occurred in the middle of the night in downtown Wilmington, is not unreasonable. Defense counsel is not required to put forth a Herculean investigative effort to fall within the range of reasonable professional conduct.

B Failure to Suppress or Admit Evidence

Lewis goes on to allege that defense counsel was ineffective for failing to admit a number of items into evidence, including (i) the affidavit of probable cause; (ii) the 911 recordings, which Lewis figures must have contained exculpatory evidence for the sole reason that the State decided not to play them for

²² Indeed, Lewis could not provide an address, a last name, or even the name or address of anyone who might know her.

the jury; and (iii) the testimony of both policemen who responded to the victim's 911 call, for the purpose of pointing out variances in their testimony. Lewis also argues that counsel was ineffective for failing to present the "Mary" alibi defense during his opening statement, and for failing to suppress the indictment. The Court sees no reason to second-guess defense counsel's decisions regarding defense witness selection. Indeed, the Court notes that defense counsel was appropriately following Court rules in refusing to make improper motions or unfounded allegations. Lewis' accusations merely serve to highlight the proficient legal assistance counsel provided.

C. Failure to Object

Lewis alleges that defense counsel was ineffective for failing to object (i) during the prosecutor's opening arguments; (ii) to the victim's testimony that he identified Lewis in a photographic lineup at which defense counsel was not present; (iii) to the victim's description of what Lewis was wearing on the night of the incident, where no clothing was admitted as evidence; (iv) to testimony regarding a crack pipe found in the victim's vehicle after it was recovered, when the crack pipe was not entered as evidence; (v) to the State's closing argument quoting Lewis as saying, "I need money;" (vi) to the Judge's response to a note from the jury; (vii) to the prosecutor's references to Lewis' prior criminal history at sentencing; and (viii) to leading questions posed by the prosecuting attorney.

It is clear to this Court, and the record so reflects, that defense counsel properly did not object in claims (i)-(vii) because no grounds upon which to object existed. Counsel's failure to object to the leading questions cited by Lewis were within the realm of reasonable professional assistance and reflect tactical decisions to which the Court will defer.

D. Failure to File Motions

Lewis goes on to allege that defense counsel provided ineffective assistance for failing to move (i) for a Bill of Particulars to identify the exact time the offense occurred; (ii) to dismiss the theft charge on the ground that it merged with the carjacking charge; (iii) for the Judge to recuse herself after she informed Lewis he did not have a Constitutional right to present pretrial motions on the morning of trial; (iv) for a jury instruction on the lesser included charge of Unauthorized Use of a Motor Vehicle; (v) for a continuance when Lewis experienced psychological problems during the trial; (vi) for a competency hearing; and (vii) for failing to challenge the accuracy of the psychological evaluation.

Lewis cannot meet the *Strickland* standard on any of his allegations. Lewis has failed to show how the exact time of the offense is material to his defense or the outcome of his case. Defense counsel properly refused to act on allegations (ii) and (iii) because there is no basis in law to grant the relief Lewis seeks. Finally, the Supreme Court has already noted that a jury instruction on the lesser included

charge Lewis seeks would have been inconsistent with Lewis' testimony that he borrowed the car from the victim, and held that the issue of Lewis' psychological problems with respect to his trial have been properly addressed and resolved.²³

E. Failure to Argue

Lewis goes on to allege that defense counsel's assistance was ineffective for failing to make several arguments during his trial including pointing out that the indictment did not state the exact time of the offense, and failing to (i) point out that the victim testified that he "walked" to the gas station, while the prosecuting attorney characterized the victim as "running" in his closing argument; (ii) point out that the victim could not remember the exact time at which the 911 calls were made; (iii) point out that the victim initially told the police that Lewis flagged him down, but later testified that he was stopped at a red light when Lewis approached the vehicle; (iv) to challenge variances in time between the evidence and the police report as due process violations; (v) point out that the victim told the police that Lewis was wearing a coat but then testified that Lewis was not wearing a coat; (vi) use Lewis' prepared questions during cross-examination; (vii) construct a diagram of the location in which the incident occurred; (viii) argue "judicial points" in the Motion for Acquittal; (ix) inform the jury of Lewis' psychological problems; and

²³ *Lewis*, 2005 WL 2414293 at *3-*4.

(x) point out “errors” in the presentence report. Lewis also alleges defense counsel misquoted him during closing statements.

Despite Lewis’ litany of complaints, he again fails to meet either prong of the *Strickland* test. Lewis is unable to show actual prejudice as a result of any of his allegations. Furthermore, the Court notes that Lewis’ allegations illustrate only facially reasonable professional conduct.

F. Other

Lewis makes a number of other allegations including that counsel was scheduled to start another trial for another client on the same day and failed to remove a juror who was employed as a planner for the City of Wilmington. Again, neither of these allegations illustrates anything other than typical and proper professional conduct on the part of defense counsel. With regard to Lewis’ charge that defense counsel’s representation was ineffective because no “attorney-client avenue of communication was established,” the Court notes that Lewis assumed a confrontational attitude with counsel, often ending interviews by shouting at defense counsel and walking away.²⁴

Finally, Lewis accuses defense counsel of conspiring with the prosecutor, and claims that the Prothonotary purposely placed items on the docket out of order,

²⁴ Defense counsel’s account is supported by the behavior Lewis displayed in open court.

in an effort to convict him. The Court will not address the merits of such bizarre and offensive allegations.

CONCLUSION

Having carefully considered the evidence in this case, and the record of the prior proceedings, the Court concludes that Lewis has failed to set forth a single meritorious claim under Rule 61, and that there is no question that Lewis' attorney acted as a reasonable professional. Moreover, the Court is satisfied that Defendant has not demonstrated, and in fact cannot demonstrate, actual prejudice.

Finally, the Court would like to warn Defendant that his litany of allegations was fully addressed here because this was his first motion for postconviction relief. Pursuant to Rule 61(i)(2) the Court will not address additional grounds for relief in future postconviction motions, and any such motion will be summarily denied.

For the foregoing reasons, the Motion for Postconviction Relief is **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Jimmie Lewis
Brian J. Robertson, Esquire
John S. Edinger, Jr., Esquire